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EXAMINER

BEFUMO, JENNA LEIGH

ART UNIT

PAPER NUMBER

1771

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15

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 15

Application Number: 09/747,529
Filing Date: December 22, 2000
Appellant(s): SHEPPARD, JAMES M.

Gregory N. Clements
For Appellant

MAILED
AUG 27 2003
GROUP 1700

EXAMINER'S ANSWER

This is in response to the appeal brief filed June 25, 2003.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

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(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

The rejection of claims 21 - 36 stand or fall together because as set forth in the appellant's brief.

(8) *Claims Appealed*

Claim 21 contains substantial errors as presented in the Appendix to the brief.

Accordingly, claim 21 correctly written in the Appendix to the Examiner's Answer.

(9) *Prior Art of Record*

4,259,994	HOBSON	4-1981
5,983,952	CARPENTER et al.	11-1999

(10) *Grounds of Rejection*

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The following ground(s) of rejection are applicable to the appealed claims:

- I. Claims 21 – 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hobson (4,259,994) in view of Carpenter et al. (5,983,952).

Hobson discloses a patterned fabric comprising a printed design (abstract). Further, Hobson discloses that the fabric can have a design comprising, from one side to the other, a plain terry section, a floral border section, another plain terry section (corresponding to the Applicant's central area), another floral border section, and a final plain terry section (column 3, lines 3, lines 5 – 10). The finished towel will inherently have an edge. As described by Hobson the finished towel will be blue with a floral border section on one side and gold with floral border section on the opposite side (column 3, lines 33 – 40). Hence, the towel will have a first color in the center section on the front side and a second color in the center section on the back side. Hobson teaches that the floral designs are produced by printing the design onto the warp yarns prior to weaving (column 2, lines 23 – 25). Thus, the final product will have a printed image on the loop surface. While Hobson teaches using different color yarns on the front and the back of the woven towel, producing a printed design on the woven towel, and having a border and center sections, Hobson fails to teach the having the printed pattern in the center section.

Carpenter et al. is drawn to printed woven fabrics. Carpenter et al. discloses that many attempts have been made to incorporate printed patterns onto woven fabrics (column 1, lines 36 – 37). Further, the combinations of printed designs and weaving designs offers the ability to produce fabrics containing many different patterns and colors that have a unique and distinctive appearance (column 1, lines 40 – 43). Therefore, it would have been obvious to one of ordinary skill in the art to choose various printed designs, as well as choose where to place the printed

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image on the Hobson product to create various printed products which are visually and aesthetically pleasing to consumers. Thus, claims 21 – 36 are rejected.

(11) Response to Argument

I. First, the Applicant argues that Hobson teaches away from using a jacquard loom, while Carpenter et al. is drawn to a woven fabric produced on a jacquard loom and therefore, the two references should not be combined (Appeal Brief, page 6, paragraph 3). First, with respect to the type of loom used to produce the fabric, this limitation is viewed as a method limitation. Weaving looms, such as a dobby or jacquard loom differ from more common looms by the amount of control the loom has over the individual yarns used to produce the woven fabric. In other words, the warp yarns in standard weaving machines are moved together in large sets to create patterns in the woven structure. Hence, the patterns produced in the fabric are limited. In more intricate dobby and jacquard weaving looms, the yarns are grouped in smaller sets or even controlled individually so that more intricate patterns can be produced. Thus, jacquard and dobby looms are not like oil and water, as suggested by the Applicant. They are both looms which produce woven fabrics and both rely on simple weave patterns to produce more complex structures. However, jacquard looms have the ability to produce more complex or intricate weaving patterns than the dobby loom. But both types of looms can produce the simple fabrics which are produced by the standard weaving machines as well. Thus, it is the pattern produced and not the type of weaving loom that defines the structure of the woven case.

In this case, the woven structure has edges, a border which is a first color on the front and a second color on the back side, and a center area which is the second color on the front side and the first color on the back side. The woven fabric produced by has a border, which is one color, and a center area which is a second color. Hobson also teaches that the towel is gold on one side

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and blue on the opposite side (column 3, lines 5 – 10 and 30 – 35). Additionally, Hobson teaches that printed patterns are added to the towel fabric to create intricate ornamentation in the towel fabric (column 1, lines 5 – 10). Thus, while Hobson teaches the structural design elements claimed by the Applicant, borders, printing, pile yarns, different colors, Hobson, fails to teach the specific design taught by the Applicant.

However, Carpenter et al. teaches generally in the background section, that woven fabrics can be produced on various types of weaving machines including dobby and jacquard looms (column 1, lines 15 – 20). The Applicant argues that Carpenter's teachings are not analogous to Hobson, since Carpenter et al. is drawn to fabrics woven on a jacquard loom and the two references cannot be combined (Appeal Brief, page 6, paragraph 3). The teachings of Carpenter et al. relied on in the rejections are referring to weaving techniques in general and are not limited to only jacquard weaving. In fact, the background section of Carpenter et al. refers to patterns produced on the dobby loom, the jacquard loom or other weaving looms (column 1, lines 15 – 19). Thus, Carpenter et al. teaches that combining printed and woven patterns, from any type of weaving machine, offers the ability to produce fabrics containing many different patterns and colors that have a unique and distinctive appearance. In other words, the design elements of a woven towel can be modified or changed to produce an end product that appeals to the consumer based on current trends and fads in design. Since this discussion is in the background section and is drawn to woven fabrics in general it is analogous to Hobson, and does not teach away from or contradict with the woven fabric produced by Hobson. Therefore, the combination of Hobson and Carpenter et al. is proper.

II. Additionally, the Applicant argues that the prior art fails to teach the design limitations, i.e., borders adjacent each edge, color schemes, and printed patterns, recited in claim 21 (Appeal

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Brief, pages 6 – 9). First, it is noted that the Applicant did not explicitly define the term “border” in the specification and thus, cannot argue that what Hobson defined as “borders” are not “borders”. However, while Hobson may not teach the specific border design recited by the Applicant, Carpenter et al. is relied on to teach that various weave designs can be used. And, as a result, it would be obvious to one of ordinary skill in the art to change the towel design to have “borders” on all four sides of the woven fabric instead of two sides to produce an aesthetically pleasing design with a framed central area as in a picture. Thus, this feature is rejected based on the combination of Hobson and Carpenter et al.

Further, it is set forth, that all design features such as the type of printed graphic, location of the printed pattern, and colors of the border and central section, would also be rejected by the combination of Hobson and Carpenter et al. since it would have been obvious to use various design and weave patterns to produce various end products with various design features so that the different towels would appeal to a large portion of consumers. This is further evidenced by the large selection of towel designs which are sold to the public in stores. Therefore, modifying specific design features is not sufficient to distinguish the current claims from the printed towels taught by Hobson.

III. The Applicant argues that the fact that the present claim applies a printed pattern to the fabric after it is woven as opposed to applying the print to the warp yarns prior to weaving the yarns produces a sufficiently different end product (Appeal Brief, page 9, paragraph 5).

However, the printed pattern in the final product is on the pile or loop yarns in both the prior art and the present invention regardless of when the print is applied. Thus, there would be no difference in the structure of the final product. Therefore, the order of applying the printed pattern is not given any patentable weight at this time. Further, it is noted that the Applicant

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admits in the specification that it is well known to apply print patterns to towels (page 2, paragraph 2). Thus, since applying print to a towel is well known, it would be well within the general knowledge of one having ordinary skill in the art to apply the printed pattern at any time during the process. In fact, it is well known how to apply printed graphics to various woven materials regardless of weave pattern, including clothing, bedding materials, and towels. Thus, the design limitations, in the Applicant's claims, i.e., a weave pattern in conjunction with a printed pattern, are not sufficient to distinguish the final product, from a woven fabric with border and central sections, and a design printed on the pile or loop yarns as taught by Hobson. Further, Carpenter et al. discloses that it is well known to change the design features to produce aesthetically pleasing end products. Therefore, the design modifications, argued by the Applicant as patentable features, are instead, modifications which are well within the general skill of a worker in the art.

IV. Finally, the Applicant has argued that the claims are allowable due the commercial success as evidenced by the Affidavits submitted on November 21, 2002, and April 21, 2003. The Applicant submitted evidence which shows that the claimed invention has increased in yearly sales every year since the towel was introduced on the market and the towel accounts for a large percent of the Applicant's total revenue. Now first, while the Applicant shows that the yearly sales for the towel increased, the Applicant fails to disclose how long the towel was sold for in 2000. Hence, if the towel was only sold for half of 2000, then the sales figures for 2001 could actually represent lower sales per month, but greater sales for the year since the towel was sold all 12 months. Second, the Applicant doesn't disclose if other similar products were no longer produced by the Applicant during the period represented by the sales figures. If the Applicant removed an older and similar product in order to sell the presently claimed product,

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consumers would be given less options and this would manipulatively effect the sales of the towel without actually indicating commercial success. Thus, while evidence shows that sales increased for the claimed product, the evidence is not sufficient to provide the reasons for the increase in sales.

Further, the Applicant could not provide information which would show the market share of the claimed towel, or even show how the towel did as compared to similar products. Thus, the sales information provided *only* represents the claimed towel as compared to the Applicant's other products. Could the sales be a result of outside companies removing products from the market or going out of business? Are the sales a result of the Applicant's own plans to push this one product to the exclusion of their other products? Finally, is the amount of revenue generated by the claimed towel due to the product's mark-up price and not a direct indicator of the products successfulness? Therefore, the evidence provided by the Applicant does not provide a good perspective of how the product has done in the market as a whole or compared to similar products sold by competitors. Therefore, one cannot reasonably tell what the increased sales of the presently claimed product is a result of.

Additionally, the Applicant provided statements from competitors which stated these other companies would not sell a similar product while the present patent application was pending. While these statements provide evidence that the towel is a desired product, these statements also reflect the competitors desire to avoid an infringement law suit if the pending application were to be given a patent. These statements do not actually provide evidence of the novelty of the present claims. Therefore, these statements are not sufficient evidence to establish commercial success or long felt need.

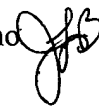
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Further, according to MPEP § 716.03, the Applicant bears the burden of showing the commercial success is due to the invention as claimed. While the Applicant has provided sales figure for the present product, there is no evidence that shows these sales are a direct result of the structure of the presently claimed product. As set forth above, there is nothing to show that the sales are due to the towel itself and not due to other external factors such as the Applicant's marketing strategies or production planning, or failures by competing companies. Thus, the evidence is not sufficient to withdrawal the rejection.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

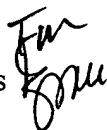
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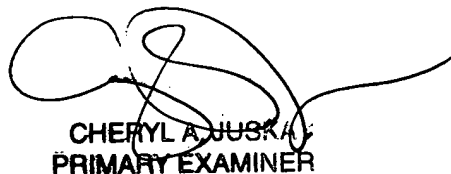
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August 21, 2003

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APPENDIX

Claim 21. A towel having a graphic impression, produced by: weaving a towel on a Jacquard loom using at least two different colors of yarn, such that a border having a first color is woven adjacent each edge of said towel, on one side thereof, and a border having a second color is woven adjacent each edge of said towel on the other side, said towel having a central area woven within said borders on both said one side and said other side, said central area on said other side is woven with said first color, said central area on said one side is woven with said second color, and forming a graphic impression in said central area on said one side.